

69-3100-8501-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Lucius Johnson,

Petitioner,

FINDINGS OF FACT,  
CONCLUSIONS OF

LAW,

v.

AND RECOMMENDATION

County of Anoka,

Respondent.

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on April 5, 1994, at 9:30 a.m. at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota.

Jesse Gant, III, Attorney at Law, 400 South Fourth Street, Suite 915, Minneapolis, Minnesota 55415 appeared on behalf of Petitioner, Lucius Johnson. Marcy S. Crain, Assistant Anoka County Attorney, 2100 Third Avenue, Anoka, Minnesota 55303-2265 appeared on behalf of Respondent, Anoka County. The record closed on this matter on April 5, 1994, upon the close of the hearing.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, Veterans Service Building, 20 West Twelfth Street, St. Paul, Minnesota 55155-2079, telephone number (612) 297-5828.

STATEMENT OF ISSUE

Whether Petitioner's resignation from his position with Anoka County in lieu of being fired, without notice of his rights under Minn. Stat. 197.46 (the Veterans Preference Act), constitutes a

waiver of those rights.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Lucius Johnson served on active duty in the U.S. Army from October 3, 1946, to February 19, 1948. Johnson was separated from the service with an honorable discharge.

2. In December, 1974, Johnson was hired by Anoka County as a property tax appraiser. Appraisers conduct the valuation and classification of property in the county. The job duties of that position required visiting properties to view them and take notes on their condition. These notes were then used by the appraiser to set a value on the property and calculate the appropriate tax.

3. Edward L. Thurston was a senior appraiser in the Anoka County Assessor's Office in 1984. Thurston worked with Johnson and assisted him in improving his performance. Thurston had limited supervisory duties over Johnson. Gordon Starkey, Deputy County Assessor, was Johnson's immediate supervisor in Anoka County. Starkey conducted performance evaluations for Johnson. Starkey did not have the authority to hire or fire employees. Gayle Leone was the Anoka County Assessor in 1984. Leone had the authority to hire and fire employees within the County Assessor's Office.

4. Before 1981, the tax appraisal system in Anoka County used field cards which the assessors filled out after visiting the properties being assessed. The data on the field cards were combined with tables and codes used by the appraisers to establish the proper value and tax rate on property. Johnson's performance before 1981 had been criticized by Starkey as too detailed and, due to the excess of detail, too slow. Johnson developed a backlog of properties not appraised.

5. In 1981, Anoka County changed the system used to register property assessments. The tables and codes, formerly used manually, were installed into a computer system which performed the calculations which had been done by the appraisers. Johnson's backlog increased after the computer system was adopted.

6. Johnson was informed by Gayle Leone, Anoka County Assessor, that Johnson's performance in timely completion of field cards was not meeting the County's expectations. Johnson was suspended for five days without pay for failing to meet these expectations. The suspension ran from November 3, 1983, to November 9, 1983. The suspension notice, dated November 2, 1983, listed three areas requiring improvement.

- a. The first area was the need to master the basic concepts of the Anoka County Appraisal Manual and the TACS Computer Appraisal Program. The notice indicated the quality of appraisal work performed by Johnson was inadequate and several problems with his work had been pointed out and

not corrected.

- b. The second area identified in the suspension notice was Johnson's failure to complete his annual report and twenty-five percent of his appraisals. As of the date of the notice, Johnson completed less than twenty percent of his appraisals. c. The third area listed in the suspension notice was Johnson's failure to notify his supervisor when leaving work for personal reasons.

7. After listing the three areas for improvement, the suspension notice stated:

Improvement Needed:

In a period of thirty days after your suspension, you must demonstrate an ability to fully understand the Anoka County Appraisal System. Further, you must demonstrate your ability to complete appraisals in a timely and accurate manner. Specifically, you must complete your 25% and annual appraisals within 30 days after your suspension. Finally, you must notify your supervisor before taking any time off for personal reasons. If the improvement in your work habits and ability is not demonstrated within the thirty calendar day time period, I will have no recourse other than to terminate your employment with Anoka County. Further, if at any time you fail to notify your supervisor before taking time off from employment for personal reasons, your employment with Anoka County will be terminated.

Exhibit 4, at 2.

8. After 30 days, Johnson's performance had not improved, but Leone did not immediately proceed to discharge Johnson. He delayed taking the action hoping that Johnson would improve his performance.

9. By March 4, 1984, Leone concluded that action needed to be taken to improve office productivity to meet deadlines faced by the County Assessor's Office. Leone needed time to hire and train an assessor to replace Johnson. Leone believed that he would require four to five months to gather the documentation and go through the procedures necessary to fire Johnson.

10. On March 4, 1984, a meeting was held between Johnson, Leone, Thurston, and Starkey. At that meeting, Leone informed Johnson that his work performance had not improved and that Johnson had the choice of resigning or being terminated. Johnson was given one day to decide whether to resign. No one informed Johnson that, as a veteran, he had the right to a hearing and that the burden would be on the County to demonstrate that Johnson was incompetent or had committed misconduct before he could be removed from his position. Leone told Johnson that a letter of recommendation would be written for Johnson if he resigned.

11. On March 5, 1984, Johnson submitted a one-sentence letter of resignation to Leone. His last day of employment with the County was March 9, 1984. An exit interview was conducted by Bonnie Craig with Johnson and he received severance pay in the amount of \$2,717.42. The form prepared in the exit interview does not reflect the actual reasons for Johnson's resignation. Johnson chose to resign to avoid having a termination on his record. A neutral letter of recommendation was written for Johnson by Leone.

12. After the termination of his employment with the County, Johnson applied for unemployment compensation benefits. The County argued before the Minnesota Department of Economic Security that Johnson had voluntarily terminated his employment and was, therefore, ineligible for benefits. The Department of Economic Security ruled that Johnson was involuntarily terminated and that Johnson was eligible for benefits. Johnson received \$1,146.00 in unemployment benefits.

13. Johnson was unaware of any veterans preference rights in public employment until he read an advertisement in the Minneapolis Star-Tribune. Within a few days after seeing the advertisement, Johnson engaged an attorney and initiated this veterans preference claim.

14. On December 22, 1993, Johnson filed a Petition with the Commissioner of Veterans Affairs asserting that Johnson's rights under the Veterans Preference Act had been denied by Anoka County. The Commissioner issued a Notice of Petition and Order for Hearing on January 4, 1994.

15. The parties stipulated that the issuing of damages be bifurcated for determination at a later date.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over the subject matter of this hearing, pursuant to Minn. Stat. 14.57 and 197.481.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. Petitioner is an honorably discharged veteran and entitled to the protections of Minn. Stat. 197.46.

4. Petitioner was removed from his position as a Property Tax Appraiser without being notified of his right to a hearing as required by Minn. Stat. 197.46.

5. Anoka County's failure to notify Petitioner of his right to a hearing violates Minn. Stat. 197.46.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

That Anoka County's termination of Petitioner be held a violation of the Veterans Preference Act and this matter be remanded to the Administrative Law Judge for further proceedings to determine what remedy is appropriate.

Dated this 28th day of April, 1994.

STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Taped (three tapes).

#### MEMORANDUM

The Veterans Preference Act conditions removal of a veteran on either incompetence or misconduct. Minn. Stat. 197.46. A veteran may also be removed, without violating the Act, where the employer abolishes the veteran's position in good faith. State ex rel. Boyd v. Mattson, 193 N.W. 30, 32 (Minn. 1923). In this case, the County Assessor, the official with the power to fire, concluded that Johnson would be terminated for incompetence. It seems fairly clear that the County could have demonstrated Johnson's incompetence. When Johnson was informed that the County had reached that conclusion, he was offered the option of resigning his position. The County did not inform Johnson that, as a veteran, he was entitled to a hearing and a written statement of charges.

The former Anoka County Assessor, Gayle Leone, testified that the March meeting with Johnson was for the purpose of "snapping him [Johnson] out of it;" meaning for Johnson's performance to improve. This is inconsistent with Leone's acknowledged statement that he thought it would be best if Johnson resigned. The testimony is also inconsistent with Leone's impression that the meeting was called because they could not wait any longer for Johnson to improve. Calling a meeting to motivate Johnson out of his nonperformance would necessarily require waiting longer. Johnson had already been suspended for nonperformance and the next logical step was termination. The decision to discharge Johnson had been made by the time of the March meeting and Johnson's testimony, that he was given one day to decide to either resign or be fired, is credible. It is possible that Leone did not actually utter the words, "or be fired." But that is what he intended, what he implied, and what Johnson

understood.

As stated in *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987), "whether an employer has by its action removed a veteran is a matter of substance and not of form." Anoka County removed Johnson when the decision was made to terminate him. That decision was made on or before March 4, 1984. Johnson's right to be notified of the right to a hearing attached at that time. Anoka County's failure to notify Johnson of his right to hearing violated the Veterans Preference Act.

Anoka County argues that Johnson's resignation eliminated the employment relationship before he could be removed. In *Chase v. Independent School District No. 31*, 1993 WL 459883 (Minn.App. 1993), a veteran resigned after committing acts of misconduct. An advisory group and a supervisor suggested that it would be in everyone's best interest if the veteran resigned. In its decision, the Court of Appeals stated:

In any event, there is no evidence that Chase left his job because of good cause attributable to the District. Good cause will not be attributed to an employer if the employee's reason for quitting is unreasonable. *Shanahan v. District Memorial Hosp.*, 495 N.W.2d 894, 897 (Minn.App. 1993). Chase testified that he believed that he would be terminated if he did not resign. This was arguably a reasonable belief, although Chase resigned before District officials took any steps toward firing him. More importantly, Chase testified that he resigned because he did not believe that he would receive the procedural rights to which he was entitled if he chose to contest the potential termination. Nothing in the record shows reasonable grounds for this belief.

Chase, 1993 WL 459883.

In *Chase*, the veteran resigned before a decision to discharge was made by the employer. In this case, the decision had been made. Johnson was not given any alternative to removal from his position. His choice was to resign or be fired. Anoka County made that decision before Johnson resigned and there is no indication that Anoka County's decision was in any way conditional. Johnson reasonably believed that the decision was final and would not be altered. He was unaware of any hearing right and the fact that Anoka County would bear the burden of proof to demonstrate incompetence or misconduct. Having decided to terminate him, Anoka County was obliged to inform Johnson of his rights when offering him the option of resigning. Anything less vitiates the effectiveness of the Veterans Preference Act and could, as here, deny the veteran any opportunity to make a knowing decision on whether to demand a hearing or resign and waive his rights.

The record in this matter was developed on the issue of liability under the Veterans Preference Act. The parties have agreed to bifurcate this matter and address the issue of damages in a separate hearing. Should the Commissioner of Veterans Affairs adopt the Administrative Law Judge's Recommendation, this

matter should be remanded on the issue of what remedy is appropriate.

S.M.M.